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# IN RE A.R.B.: TOWARD A REDEFINITION OF THE BEST INTERESTS STANDARD IN GEORGIA CHILD CUSTODY CASES

## INTRODUCTION

With the advent of no-fault divorce laws<sup>1</sup> in the 1970s, single-parent households, blended families,<sup>2</sup> and stepparents have become familiar fixtures on the domestic scene.<sup>3</sup> Prior to 1990, a typical divorce settlement almost inevitably provided that the mother would retain sole custody of the minor children, while her former husband would be entitled to visit his children two weekends per month and several weeks during the summer.<sup>4</sup>

In the 1990s, the law of child custody in Georgia has undergone statutory developments that bode significant and permanent change in the way child custody disputes will be adjudicated.<sup>5</sup> Beginning in 1990, the belief that children of divorce should benefit from the continued and substantial involvement of both parents in their lives began to find clear expression in the Georgia Code.<sup>6</sup> *In re A.R.B.*<sup>7</sup> is a recent attempt by the Georgia Court of Appeals to wrestle with the very issues these statutes raise. The appellate decision, currently

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1. A no-fault divorce does not require the parties "to prove fault or grounds for divorce beyond a showing of irretrievable breakdown of marriage or irreconcilable differences." BLACK'S LAW DICTIONARY 480 (6th ed. 1990). A majority of states recognize a form of no-fault divorce. *Id.*

2. A blended family is a family that includes children living with one parent and the spouse of that one parent. Randy F. Kandel, *Which Came First: The Mother or the Egg? A Kinship Solution to Gestational Surrogacy*, 47 RUTGERS L. REV. 165, 212 (1994).

3. See Judith B. Jennison, *The Search for Equality in a Woman's World: Fathers' Rights to Child Custody*, 43 RUTGERS L. REV. 1141, 1141-42 (1991).

4. *Id.* at 1142, 1146.

5. 1990 Ga. Laws 1423, § 1 (codified at O.C.G.A. § 19-9-3(a) (Supp. 1994)) (eliminating any prima facie right to custody in the father or the mother); 1990 Ga. Laws 1423, § 2 (codified at O.C.G.A. § 19-9-6 (1991)) (providing definitions of joint custody, joint legal custody, and joint physical custody); 1991 Ga. Laws 1389, § 1 (codified at O.C.G.A. § 19-9-3(d) (Supp. 1994)) (expressing the legislative policy "to encourage parents to share in the rights and responsibilities of raising their children after such parents have separated or dissolved their marriage").

6. See O.C.G.A. § 19-9-3(d) (Supp. 1994).

7. 433 S.E.2d 411 (Ga. Ct. App. 1993), *cert. granted sub nom.* B. v. B., No. S94C1253 (Ga. Sept. 20, 1994).

under review by the Georgia Supreme Court, may well be regarded as a watershed case in Georgia's child custody law.

Georgia courts determine custody of minor children in accordance with the "best interests standard."<sup>8</sup> Under this standard, the court exercises its discretion to determine what will best promote the welfare and happiness of the child.<sup>9</sup> The emergence of the best interests standard can be traced to Justice Cardozo's 1925 opinion in *Finlay v. Finlay*.<sup>10</sup> Although statutes and case law that attempt to give content to the best interests standard have often been couched in gender neutral terms, the wide discretion given to trial courts has resulted in an ingrained judicial habit of awarding custody to the mother.<sup>11</sup> Fathers who seek custody are required to accomplish the virtually impossible task of proving the mother unfit to avoid being relegated to a marginal role in the lives of their children.<sup>12</sup> *In re A.R.B.* suggests that this exclusion of fathers from the post-divorce

8. See, e.g., *Jordan v. Jordan*, 25 S.E.2d 500, 501 (Ga. 1943). Welfare of minor children is paramount in habeas corpus proceedings involving child custody disputes between parents. *Id.* (citing *Attaway v. Attaway*, 22 S.E.2d 50 (Ga. 1942)); see also *Hodges v. Hodges*, 47 S.E.2d 823, 825 (Ga. Ct. App. 1948).

9. O.C.G.A. § 19-9-3(a) (Supp. 1994) ("The duty of the court in all such cases shall be to exercise its discretion to look to and determine solely what is for the best interest of the child or children and what will best promote their welfare and happiness and to make its award accordingly.").

10. See 148 N.E. 624, 626 (N.Y. 1925) ("The chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as *parens patriae* to do what is best for the interest of the child.").

11. See generally GENDER AND JUSTICE IN THE COURTS: A REPORT TO THE SUPREME COURT OF GEORGIA BY THE COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM (1991), reprinted in, 8 GA. ST. U. L. REV. 539, 656-57 (1992) [hereinafter GENDER AND JUSTICE].

12. *Id.* at 659-60; see also O.C.G.A. § 19-7-1(b) (1991). Acts that may constitute loss of parental rights are:

- (1) Voluntary contract releasing the right to a third person;
- (2) Consent to the adoption of the child by a third person;
- (3) Failure to provide necessities for the child or abandonment of the child;
- (4) Consent to the child's receiving the proceeds of his own labor, which consent shall be revocable at any time;
- (5) Consent to the marriage of the child, who thus assumes inconsistent responsibilities; or
- (6) Cruel treatment of the child.

*Id.* But see *Perkins v. Courson*, 135 S.E.2d 388 (Ga. 1964). "[F]itness is not necessarily synonymous with the absence of the conduct penalized by [this section]. The fact that a parent has not forfeited or relinquished his parental right by any of the [prohibited acts] does not establish him as fit." *Id.* at 396 (emphasis omitted).

family is the evil that the legislation of the early 1990s sought to remedy.<sup>13</sup> The case expresses a judicial preference for equal parenting via joint custody based on what the court determined to be the public policy of the state.<sup>14</sup>

This Comment focuses on the holding of *In re A.R.B.* and examines the issues in the case that are currently under appeal. After an overview of child custody law in Part I, Part II traces the historical development of Georgia child custody doctrines. Part III describes the factual scenario giving rise to the *In re A.R.B.* decision and critically analyzes the court's holding. The issues under appeal are examined in Part IV, and a proposal for a more manageable standard is explored in Part V.

## I. HISTORICAL DEVELOPMENT OF CHILD CUSTODY LAW

### A. *The Early Paternal Bias*

Husband and wife were one at common law with the husband being the one.<sup>15</sup> Thus, the husband had absolute right to custody of the children upon divorce under the doctrine of *paternal familium*.<sup>16</sup> This right was accompanied by a obligation of support.<sup>17</sup> The courts strictly adhered to the doctrine, giving rise to some harsh results.<sup>18</sup> Justice Brewer of the Kansas Supreme Court expounded upon the paternal preference in 1881:

The father is the natural guardian and is *prima facie* entitled to the custody of his minor child. This right springs from two sources: one is, that [it is] he who brings a child, . . . into life . . . ; the other reason is, that it is a law of nature that the affection which springs from such a relation as that is

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13. *In re A.R.B.*, 433 S.E.2d 411, 413 (Ga. Ct. App. 1993); see *supra* note 5.

14. *Id.* ("It is thus evident that the stated legislative policy abandons traditional biases and favors shared parenting rights and responsibilities.").

15. Lewis Kapner, *Joint Custody and Shared Parental Responsibility: An Examination of Approaches in Wisconsin and in Florida*, 66 MARQ. L. REV. 673, 679 (1983).

16. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 737 (1988) (explaining the doctrine of *paternal familium*).

17. *Id.*

18. See, e.g., Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 ISSUES L. & MED. 283, 292 n.66 (1991); Kapner, *supra* note 15, at 679 n.32 (citing *Welch v. Welch*, 33 Wis. 534 (1873) (giving custody of young boy to father who had deserted the mother and child with no support)).

stronger and more potent than any which springs from any other human relation.<sup>19</sup>

### *B. The Best Interests Standard and the Maternal Preference*

In the nineteenth century, a shift away from the *paternal familium* doctrine occurred.<sup>20</sup> The best interests standard surfaced in 1813 when a Pennsylvania court denied custody to a father who obtained a divorce.<sup>21</sup> Although the wife had committed adultery, the court found no fault in her care of the children.<sup>22</sup> The best interests standard was expressed within the "tender years doctrine":

It is to [the children], that our anxiety is principally directed; and it appears to us, that considering their tender age, they stand in need of that kind of assistance, which can be afforded by none so well as a mother. It is on their account, therefore, that exercising the discretion with which the law has invested us, we think it best, at present, not to take them from her.<sup>23</sup>

The best interests standard gradually evolved into a maternal preference that was as strong as the preceding paternal bias.<sup>24</sup> The courts waxed eloquent in their tributes to motherly love. In awarding custody, a 1921 Wisconsin court theorized, "For a boy of such tender years nothing can be an adequate substitute for mother love . . . because in her alone is duty swallowed up in desire; in her alone is service expressed in terms of love."<sup>25</sup> Justice Fulbright of the Missouri Supreme Court wrote in 1938: "There is but a twilight zone between a mother's love and the atmosphere of heaven."<sup>26</sup> Justice Terrell of the Florida Supreme Court gave the ultimate tribute in 1941:

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19. Kapner, *supra* note 15, at 679-80 (second bracket added) (quoting *Chapsky v. Wood*, 26 Kan. 650, 652 (1881)).

20. See generally Fineman, *supra* note 16, at 737; Griffith, *supra* note 18, at 292; Jennison, *supra* note 3, at 1144.

21. Griffith, *supra* note 18, at 293 (citing *Commonwealth v. Addicks*, 5 Binn. 520 (Pa. 1813)).

22. *Id.*

23. *Id.* (quoting *Addicks*, 5 Binn. at 521-22).

24. See GENDER AND JUSTICE, *supra* note 11, at 656-57.

25. Kapner, *supra* note 15, at 680 (quoting *Jenkins v. Jenkins*, 181 N.W. 826 (Wis. 1921)) (reversing trial court's award of two eldest sons to the father).

26. *Id.* at 680 (quoting *Tuter v. Tuter*, 120 S.W.2d 203, 205 (Mo. Ct. App. 1938)).

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[S]he is morally[,] spiritually, and biologically best suited to care for [the child] during infancy and adolescence. She is more sensitive to influences that are derogatory to its health and character and has been known to pursue it to the gutter and retrieve it after the father had abandoned it. In deeds springing from innate nobleness, the mother is the peer of the father and when it comes to instinctive and intuitional powers[,] she is much his superior.<sup>27</sup>

Such praises were reserved for women who knew their place. Justice Terrell wrote in 1943: "If she goes and returns as a wage earner like the father, she has no more part in [child care] than he and it necessarily follows that all things else being equal, she has no better claim when the matter of custody is at issue."<sup>28</sup> Courts generally deprived the mother of custody only if she was proven to be mentally unfit, failed to provide a healthy home, or was guilty of flagrant adultery or complete abandonment.<sup>29</sup>

### C. A Gender-Neutral Best Interests Standard

In the latter twentieth century, most states have retained the best interests standard.<sup>30</sup> However, many courts have attempted to abandon the maternal preference and shift to gender-neutral standards.<sup>31</sup> This shift may be attributed to changes in the normal family unit.<sup>32</sup> Different perceptions about family planning, increased opportunities for women in the workplace, and redefinition of the roles of men and women have made the traditional nuclear family less common.<sup>33</sup> As women's participation in the workforce has increased (sixty-eight percent as of 1989) men's participation in child-rearing has likewise increased.<sup>34</sup> Some feminists have pushed for joint custody in an effort to require men to assume equal child-rearing responsibility.<sup>35</sup> Fathers' rights groups have also been

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27. *Id.* at 680-81 (second and fourth brackets added) (quoting *Randolph v. Randolph*, 1 So. 2d 480, 481-82 (Fla. 1941)).

28. *Id.* at 681 (quoting *Watson v. Watson*, 15 So. 2d 446, 447 (Fla. 1943)).

29. *See, e.g.*, *Blackburn v. Blackburn*, 168 So. 2d 898, 902 (La. Ct. App. 1964).

30. Griffith, *supra* note 18, at 283.

31. Jennison, *supra* note 3, at 1145-46.

32. *Id.* at 1145.

33. GENDER AND JUSTICE, *supra* note 11, at 658; Jennison, *supra* note 3, at 1145.

34. Jennison, *supra* note 3, at 1141. The sixty-eight percent figure represents women with children under the age of eight. *Id.*

35. Fineman, *supra* note 16, at 768.

instrumental in the shift to a gender-neutral standard.<sup>36</sup> Additionally, judicial interpretation of the Equal Protection Clause in the 1970s gave rise to more equal treatment of the sexes.<sup>37</sup> Consequently, statutes that used sex-based classifications, including those affording maternal preference in custody disputes, were attacked and struck down.<sup>38</sup>

Although the best interests standard remains the umbrella standard, a number of subsidiary principles have developed.<sup>39</sup> The tender years presumption and the primary caretaker rule tend to result in the traditional award of sole custody.<sup>40</sup> Many states have enacted legislation that creates an option or a presumption in favor of joint custody as in the child's best interests.<sup>41</sup> Other states apply no articulable rules, but continue to rely upon the case-by-case approach.<sup>42</sup>

### 1. *The Tender Years Presumption*

The tender years doctrine presumes that a child of tender years is best cared for by the mother.<sup>43</sup> In applying this

36. Jennison, *supra* note 3, at 1148.

37. See, e.g., *Orr v. Orr*, 440 U.S. 268, 270, 283 (1979) (awarding alimony only to women violates the Equal Protection Clause of the Fourteenth Amendment); *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973) (finding sex-based classification inherently suspect).

38. See, e.g., *Ex parte Devine* (*Devine v. Devine*), 398 So. 2d 686, 695-96 (Ala. 1981) (holding that a rule dictating maternal custody unless there is a showing of the mother's unfitness violates the Fourteenth Amendment); *King v. Vancil*, 341 N.E.2d 65, 68-69 (Ill. App. Ct. 1975) (holding that a maternal preference unless there is a showing of the mother's unfitness violates the Illinois Equal Protection Amendment); *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285, 290-91 (Fam. Ct. 1973) (striking down New York's maternal preference law as a violation of father's equal protection rights under the Fourteenth Amendment).

39. See generally Fineman, *supra* note 16.

40. Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 518-22 (1988).

41. Maureen McKnight, *Issues and Trends in the Law of Joint Custody*, in *JOINT CUSTODY & SHARED PARENTING* 209, 210-11 (Jay Folberg ed., 2d ed. 1991). As of 1991, twenty-three states had adopted joint custody as an option. *Id.* at 210; see, e.g., TENN. CODE ANN. § 36-6-101(a) (Supp. 1994); VA. CODE ANN. § 20-124.1 to .2 (Michie Supp. 1994). Some jurisdictions presume that "shared parenting is in the child's best interest." McKnight, *supra*, at 211; see, e.g., IDAHO CODE § 32-717B(3)-(4) (Supp. 1994); N.H. REV. STAT. ANN. § 458:17 (1992). Florida mandates shared parenting over parental objection unless detriment to the child can be shown. FLA. STAT. ANN. § 61.13 (West Supp. 1995).

42. See Robert F. Cochran, Jr., *Reconciling the Primary Caretaker Preference, the Joint Custody Preference, and the Case-by-Case Rule*, in *JOINT CUSTODY & SHARED PARENTING*, *supra* note 41, at 218, 218-19.

43. *Id.* at 219. "Courts have held that a child grew out of the 'tender years'

doctrine, courts consider, among other factors, the child's age, health, and sex.<sup>44</sup> Although most statutes have become gender-neutral, the maternal preference afforded by the tender years doctrine still prevails in some jurisdictions.<sup>45</sup>

## 2. *The Primary Caretaker Rule*

The primary caretaker rule assumes that children need "day-to-day care" and that the parent who has cared for them throughout the marriage should be awarded custody.<sup>46</sup> The relevant inquiry is past performance; fact-finding, rather than speculation, is employed in applying the rule.<sup>47</sup> Primary caretaker status is a significant factor in several states.<sup>48</sup> West Virginia has expressed a specific preference for the rule.<sup>49</sup> The primary caretaker rule is somewhat superior to the maternal preference of the tender years doctrine in several ways. First, it is facially gender neutral;<sup>50</sup> a father who has acted as primary caretaker would be as entitled to custody as the mother. Second, it provides continuity for the child and accurately pinpoints the traits that are important to the child.<sup>51</sup> Finally, it reduces litigation by producing predictable results.<sup>52</sup> The rule, however, discounts the role of the noncaretaking, or "secondary," parent.<sup>53</sup> Furthermore, application of the primary caretaker rule usually

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category at ages ranging from four to fourteen." *Id.* at 219 n.4.

44. Frank C. Williams III, *Domestic Law, Annual Survey of South Carolina Law*, 41 S.C. L. REV. 85, 87 (1989).

45. Jennison, *supra* note 3, at 1149. Jurisdictions that still allow determination based on the tender years criteria include South Carolina, Tennessee, and Wyoming. *Id.*; Williams, *supra* note 44, at 87.

46. Fineman, *supra* note 16, at 771. Determining which party is the primary caretaker can be established in less than an hour via testimony of parties, teachers, relatives, and neighbors. *Id.* at 771 n.171.

47. *Id.* at 772. The criteria for selecting a custodial parent are clear enough that parents will be able to predict the outcome of a trial. *Id.*

48. Cochran, *supra* note 42, at 223; see, e.g., MINN. STAT. ANN. § 518.17(3) (West Supp. 1995); IOWA CODE ANN. § 598.41.3.d (West Supp. 1994).

49. See Garska v. McCoy, 278 S.E.2d 357, 362-63 (W. Va. 1981) (presuming it is in the best interests of very young children to be placed in the custody of primary caretaker).

50. Fineman, *supra* note 16, at 773. Although the rule is facially gender neutral, the "impact may not be gender neutral, but this result only reflects the fact that women are the primary nurturers of children." *Id.* (footnote omitted).

51. Cochran, *supra* note 42, at 225.

52. *Id.*

53. Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 617 (1992).



results in sole custody.<sup>54</sup> This result seldom fosters a close and continuing relationship with the noncustodial parent whose relationship is confined to the boundaries of usual and customary visitation.<sup>55</sup>

### 3. *Joint Custody*

Jurisdictions that favor joint custody seek to impose equalitarian family roles.<sup>56</sup> Joint legal custody, joint physical custody, or both are usually authorized.<sup>57</sup> Over forty states now have some type of legislation favoring joint custody.<sup>58</sup> Only South Carolina<sup>59</sup> and Nebraska<sup>60</sup> expressly disfavor the doctrine. Florida favors shared parenting even over parental objection.<sup>61</sup>

Critics of joint custody argue that it may lead to conflict between parents.<sup>62</sup> The practice has been characterized as an "idealistic but ultimately unsuccessful effort to reform parental roles by fiat."<sup>63</sup> Joint legal custody restricts the decisionmaking power of the custodial parent; consequently, shared parental decision-making may create occasions for hostility.<sup>64</sup> The child who is shuttled between adversarial parents with "different lifestyles and disciplinary attitudes" may become a pawn in the resulting power struggle.<sup>65</sup> Fathers who are not truly interested in caring for their children may use "custody blackmail" as a means of reducing alimony and support payments.<sup>66</sup> Joint

54. Cochran, *supra* note 42, at 223.

55. *Id.* at 226.

56. Fineman, *supra* note 16, at 735. Equalitarianism presumes no difference between men and women as child nurturers. *Id.*

57. McKnight, *supra* note 41, at 210-11.

58. *Id.* at 209.

59. Bolick v. Bolick, 376 S.E.2d 785, 786 (S.C. Ct. App. 1989) (holding that "divided custody [is to] be avoided if at all possible and such will not be approved except under exceptional circumstances").

60. Wilson v. Wilson, 399 N.W.2d 802, 803 (Neb. 1987) (disfavoring joint custody, which is "reserved for only the rarest of cases").

61. FLA. STAT. ANN. § 61.13(2)(b)2 (West Supp. 1995) (providing that the court shall order shared parental responsibility for minors unless such shared parenting would be harmful to the child).

62. See Cochran, *supra* note 42, at 228; Kapner, *supra* note 15, at 686-87; Singer & Reynolds, *supra* note 40, at 507-09.

63. Scott, *supra* note 53, at 670.

64. Singer & Reynolds, *supra* note 40, at 508.

65. Kapner, *supra* note 15, at 687.

66. Singer & Reynolds, *supra* note 40, at 515-16. Custody blackmail occurs when a

custody awards have been criticized as an “easy out” for judges, allowing them to avoid hard choices and the appearance of discrimination.<sup>67</sup>

Proponents of joint custody argue that it offers the primary residential parent relief from the stress of full-time parenting.<sup>68</sup> Additionally, joint custody allows the nonresidential parent to continue the enjoyment of undiminished parental rights and responsibilities, thereby mitigating the sense of loss and outcast status that often follows divorce.<sup>69</sup> Furthermore, joint custody provides for meaningful contact and nurturing from both parents and avoids gender-based stereotypes.<sup>70</sup> Some feminists, fathers’ rights groups, and social scientists insist that joint custody preserves the traditional role of the family by allowing the child to develop closer parental bonds and by providing each parent with a more fulfilling child-rearing role.<sup>71</sup>

#### 4. *The Case-by-Case Approach*

The case-by-case approach of the best interests standard has received mixed reviews. Detractors decry it as “indeterminate,” requiring decisions based on psychological and social factors the judiciary is ill-equipped to make.<sup>72</sup> Furthermore, they maintain that it requires speculation about a child’s future well-being.<sup>73</sup> It offers no easily applicable guidelines, and absent a “gender presumption, the legal system is asked to do too much.”<sup>74</sup> The standard masks the importance of parental roles during the marriage and permits the judge to focus on “whatever aspects of character, capability, and experience” seem relevant.<sup>75</sup>

Chief Judge Hood of the District of Columbia Court of Appeals describes the inherent difficulties of the best interests standard:

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spouse, usually the husband, threatens to pursue custody “as a means of intimidating wives into accepting less child support and alimony.” *Id.* (quoting Richard Neely, *Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL’Y REV. 168, 169 (1984)).

67. *Id.* at 515.

68. Kapner, *supra* note 15, at 685.

69. *Id.* at 685-86.

70. *See id.*

71. Williams, *supra* note 44, at 86.

72. Fineman, *supra* note 16, at 738.

73. *Id.* at 770.

74. *Id.* at 740.

75. Scott, *supra* note 53, at 622.

[The best interests of the child] principle is easily stated but its application in a particular case presents one of the heaviest burdens that can be placed on a trial judge. Out of a maze of conflicting testimony, usually including what one court called "a tolerable amount of perjury," the judge must make a decision which will inevitably affect materially the future life of an innocent child. In making his decision the judge can obtain little help from precedents or general principles. Each case stands alone. After attempting to appraise and compare the personalities and capabilities of the two parents, the judge must endeavor to look into the future and decide that the child's best interests will be served if committed to the custody of the father or mother. . . . When the judge makes his decision, he has no assurance that his decision is the right one. He can only hope that he is right. He realizes that another equally able and conscientious judge might have arrived at a different decision on the same evidence.<sup>76</sup>

### 5. *The Approximation Rule*

Although not yet formally adopted, a recently proposed standard merges the best characteristics of the joint custody, primary caretaker, and case-by-case doctrines into a theory that merits consideration.<sup>77</sup> The "approximation" rule allocates time and decision-making authority between parents in accordance with patterns developed during the marriage.<sup>78</sup> This practice should reflect the true preferences of each parent, accurately predict caretaking arrangements, and promote continuity and stability for the child as well as the parents.<sup>79</sup> The factual inquiry is narrow: Only actual "parental participation in the child's life during the marriage [is] relevant."<sup>80</sup> The focus is on how much time each parent spent with the child, whether the parent performed basic child-care and development tasks, and whether the parent helped make decisions affecting the child.<sup>81</sup> The result is individualized, narrowly focused decisions with less

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76. Cochran, *supra* note 42, at 221-22 (quoting *Coles v. Coles*, 204 A.2d 330, 331-32 (D.C. 1964)).

77. See Scott, *supra* note 53, at 630-43.

78. *Id.* at 637-38.

79. *Id.* at 617.

80. *Id.* at 637.

81. *Id.*

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room for error because the decisions are based on quantitative and retrospective factors.<sup>82</sup>

## II. HISTORICAL DEVELOPMENTS IN GEORGIA CUSTODY LAWS

In an 1886 decision, the Georgia Supreme Court held that the father had a *prima facie* right to custody of an infant.<sup>83</sup> This right could be forfeited only in one of the modes recognized by law, which included: Voluntary release of legal and parental rights to control the child; consent to adoption; or forfeiture by abandonment, cruel treatment, bad character, immoral habits, or failure to provide necessities.<sup>84</sup> The paternal preference remained strong in Georgia as late as 1897.<sup>85</sup>

### A. *The Best Interests Standard In Georgia*

The best interests standard surfaced in Georgia in 1903 when the supreme court held that in custody proceedings the "paramount consideration is the welfare of the child."<sup>86</sup> In 1931 the Georgia Supreme Court, in accordance with Georgia statutory law, rejected the father's presumptive right to custody, holding that the court may exercise its sound discretion to determine the best interests of the child.<sup>87</sup> This decision was characterized as changing the status of women and enlarging their rights; "husband and wife now [stood] upon equal footing."<sup>88</sup> Nevertheless, Georgia trial courts often awarded custody to mothers in custody disputes, and the appellate courts summarily affirmed these custody awards.<sup>89</sup> The Georgia Supreme Court later ruled that as between parents, neither parent has a *prima facie* right to custody.<sup>90</sup>

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82. *Id.* at 638.

83. *Miller v. Wallace*, 76 Ga. 479, 486 (1886).

84. *Id.* at 483.

85. *See Franklin v. Carswell*, 29 S.E. 476 (Ga. 1897) (holding that "[t]he father is entitled to the custody of his child during minority, unless such right has been relinquished or forfeited").

86. *Lamar v. Harris*, 44 S.E. 866, 870 (Ga. 1903).

87. *Lockhart v. Lockhart*, 162 S.E. 129, 132 (Ga. 1931); *see* 1913 Ga. Laws 110; *see also infra* note 91.

88. *Lamar*, 44 S.E. at 870.

89. *See, e.g., Fuller v. Fuller*, 30 S.E.2d 600 (Ga. 1944); *Jordan v. Jordan*, 25 S.E.2d 500 (Ga. 1943); *McAlhany v. Allen*, 23 S.E.2d 676 (Ga. 1942).

90. *Gambrell v. Gambrell*, 259 S.E.2d 439, 440 (Ga. 1979); *Todd v. Todd*, 215 S.E.2d 4, 5 (Ga. 1975); *Folsom v. Folsom*, 186 S.E.2d 752, 754 (Ga. 1972); *Benefield v. Benefield*, 118 S.E.2d 464, 464 (Ga. 1961); *Sessions v. Oliver*, 50 S.E.2d 54, 58

The evolution of the best interests standard in Georgia case law brought corresponding statutory changes.<sup>91</sup> In 1913 the legislature rejected the father's automatic right to custody by enacting legislation which provided that the court's duty is to determine solely what is in the best interest of the child.<sup>92</sup> This statute remained largely unchanged until a flurry of legislation in the 1990s.<sup>93</sup>

### *B. The Emergence of Shared Parenting*

A 1990 amendment to the Georgia Code provided "there shall be no *prima-facie* right to the custody of the child or children in the father or mother."<sup>94</sup> This seems to indicate that it is not always in the child's best interests to be in the sole custody of the mother; it also makes the statute gender neutral. The amendment also added joint custody provisions:

Joint custody . . . may be considered as an alternative form of custody by the court. This provision allows a court at any temporary or permanent hearing to grant sole custody, joint custody, joint legal custody, or joint physical custody where appropriate.<sup>95</sup>

The Code defines joint custody as joint legal custody, joint physical custody, or both.<sup>96</sup> "[T]he court may order joint legal custody without ordering joint physical custody."<sup>97</sup> Variations are defined as follows:

"Joint legal custody" means both parents have equal rights and responsibilities for major decisions concerning the child, including the child's education, health care, and religious training; . . .<sup>98</sup>

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(Ga. 1948); *Hill v. Rivers*, 37 S.E.2d 386, 388 (Ga. 1946).

91. See 1913 Ga. Laws 110. "[I]n all cases where the custody of any minor child or children is involved between the parents, there shall be no *prima facie* right to the custody of such child or children in the father . . . the duty of the court being . . . to look to and determine solely what is for the best interest of the child or children . . . ." *Id.*

92. *Id.*

93. See *infra* Part II.B.

94. 1990 Ga. Laws 1423, § 1 (codified at O.C.G.A. § 19-9-3(a) (Supp. 1994)) (emphasis added).

95. *Id.*

96. 1990 Ga. Laws 1423, § 2 (codified at O.C.G.A. § 19-9-6(1) (1991)).

97. *Id.*

98. 1990 Ga. Laws 1423, § 2 (codified at O.C.G.A. § 19-9-6(2) (1991)).

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"Joint physical custody" means that physical custody is shared by the parents in such a way as to assure the child of substantially equal time and contact with both parents.<sup>99</sup>

A 1991 amendment clarified the legislative intent regarding joint custody:

It is the express policy of this state to encourage that a minor child has continuing contact with parents and grandparents who have shown the ability to act in the best interest of the child and to encourage parents to share in the rights and responsibilities of raising their children after such parents have separated or dissolved their marriage.<sup>100</sup>

The statute directs the courts to make custody awards that are not only in the child's best interests, but that are not violative of the policy favoring continued parental involvement after divorce.

Until *In re A.R.B.*,<sup>101</sup> there had been no appellate court interpretation of the joint custody provisions in the amended statutes. Studies have shown that although the Georgia laws promulgating the best interests principle are facially neutral, they are routinely applied in a gender-biased manner.<sup>102</sup> Georgia courts generally award primary custody to the mother.<sup>103</sup> The Georgia Commission on Gender Bias in the Courts found that ingrained gender-biased beliefs exist that influence judges to the detriment of fathers in custody disputes.<sup>104</sup> These include the following beliefs: (1) that a "mother is a better parent than a father";<sup>105</sup> (2) that "children, especially young children, need to be with their mothers";<sup>106</sup> (3) that "a father cannot work outside the home and be a nurturing parent";<sup>107</sup> (4) that because "a mother is presumed to be a better parent, fathers must prove the mother is unfit" to gain custody;<sup>108</sup> and (5) that when a court grants custody to a father, "it brands the mother as 'unfit' and 'unworthy.'"<sup>109</sup> Fathers

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99. 1990 Ga. Laws 1423, § 2 (codified at O.C.G.A. § 19-9-6(3) (1991)).

100. 1991 Ga. Laws 1389 (codified at O.C.G.A. § 19-9-3(d) (Supp. 1994)).

101. *In re A.R.B.*, 433 S.E.2d 441 (Ga. Ct. App. 1993).

102. GENDER AND JUSTICE, *supra* note 11, at 654.

103. *Id.* at 658.

104. *Id.* at 657-58.

105. *Id.*

106. *Id.* at 659.

107. *Id.*

108. *Id.* at 659-60.

109. *Id.* at 660.

seeking custody are often discouraged because they perceive the courts as gender-biased.<sup>110</sup> Some attorneys simply advise fathers against fighting for custody.<sup>111</sup> Even when the parents have agreed upon joint custody, some courts have been unwilling to allow or to order such an arrangement.<sup>112</sup> Although the 1990 and 1991 statutory amendments make joint custody an option under Georgia law, the Commission expressed reservations as to how much impact these amendments would have, given the existing maternal preference.<sup>113</sup>

### III. *IN RE A.R.B.*

#### A. *Facts and Procedural History*

Mr. B. and Ms. B. were married in 1987.<sup>114</sup> Their only son, A.R.B., was born in 1989.<sup>115</sup> Mr. B., a tenured college professor, had a flexible work schedule and was highly involved in caring for his young child, A.R.B.<sup>116</sup> Evidence at trial showed that he performed caretaker duties from the birth of his child to the time of the custody hearing.<sup>117</sup> He bathed, changed, fed, read to, and played with the child.<sup>118</sup> When necessary, he obtained medical attention for the child.<sup>119</sup> He arranged periodic visits with extended family.<sup>120</sup>

Ms. B. had a high profile management position with an Atlanta corporation that required extensive travel and time commitments.<sup>121</sup> She worked all day every weekday and had numerous community and charitable responsibilities.<sup>122</sup> When the mother was required to travel, the father was usually at

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110. *Id.* at 660-61. Statistics have shown that in over ninety percent of divorces, mothers are awarded custody of the minor children. Dan Menzie, Note, *Fathers are Parents Too: Pros and Cons of the New Missouri Domestic Relations Statute*, 57 UMKC L. REV. 963, 966 (1989).

111. GENDER AND JUSTICE, *supra* note 11, at 660.

112. See *Legislative Review*, 9 GA. ST. U. L. REV. 243, 244 (1992).

113. GENDER AND JUSTICE, *supra* note 11, at 664-66.

114. Brief of Appellant at 2, *In re A.R.B.*, 433 S.E.2d 411 (Ga. Ct. App. 1993) (No. A93A0698), cert. granted sub nom. B. v. B., No. S94C1253 (Ga. Sept. 20, 1994).

115. *Id.* at 3.

116. *Id.* at 2-3.

117. *Id.* at 3.

118. *Id.*

119. *Id.*

120. *Id.* at 6.

121. *Id.* at 4-5.

122. *Id.*

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home caring for A.R.B. and her teenage son from a previous marriage.<sup>123</sup>

Due to numerous marital conflicts, the parties separated in June 1991, at which time Mr. B. moved to Macon, Georgia with his child.<sup>124</sup> He took care of the child in Macon from June 27 until July 9, 1991.<sup>125</sup> On that date, the mother obtained an *ex parte* order from the Bibb County Superior Court giving her temporary custody.<sup>126</sup> Upon receiving temporary custody, the mother enrolled the child in preschool in Atlanta five days a week from about 8:30 a.m. to 4:30 p.m.<sup>127</sup> The child's afternoons and evenings were frequently spent with a babysitter-housekeeper while the mother was at work.<sup>128</sup> In March 1992 the Juvenile Court of Bibb County awarded sole physical and legal custody of the child to the mother.<sup>129</sup>

The Juvenile Court judge made specific findings of fact that "both of the parties have shared in caring for the child who was the result of this marriage," and "both the mother and the father are competent people to care for a child and they are both suitable for the care of the child of this marriage."<sup>130</sup> The judge further stated that he had been "greatly impressed by the ability, the intelligence, the demeanor, and the concern of both the husband and the wife, and conclude[d] that either of the said parties are perfectly capable of providing and caring for the child from this time forward."<sup>131</sup> Despite these findings, the court awarded sole custody to the mother and gave the father only limited visitation.<sup>132</sup> The Juvenile Court decision illustrates gender bias at work. To avoid overtly choosing the mother over the father, the court placed more emphasis on the child's relationship with his half brother, a busy teenager, than on the child's relationship with his father.<sup>133</sup> The custody order stated

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123. *Id.* at 5-6.

124. *Id.* at 3.

125. *Id.* at 4.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 7.

130. *Id.* at 6 (quoting juvenile court order).

131. *Id.* at 6-7.

132. *Id.* at 7. Visitation rights consisted of (a) first and third weekends of each month; (b) December 26 to December 31 each year; and (c) three weeks in the summer. *Id.*

133. See Brief of Appellee at 6, *In re A.R.B.*, 433 S.E.2d 411 (Ga. Ct. App. 1993)



that A.R.B. had formed a strong attachment to his only brother and should remain in his mother's home so that he could be with his brother regularly.<sup>134</sup>

The Georgia Court of Appeals reversed and remanded the juvenile court's order.<sup>135</sup> While not specifically stating that the trial court had abused its discretion, the court held that "[t]he custody order demonstrates that the court failed to give proper consideration to the joint custody options available under OCGA § 19-9-6."<sup>136</sup> The court of appeals noted the legislative intent favoring shared parenting and held that when parents have demonstrated equal ability to care for a child effectively, equal contact is in the child's best interests.<sup>137</sup> On remand, the juvenile court reluctantly awarded joint legal and physical custody to the parents.<sup>138</sup> The mother's petition for discretionary review of this permanent custody order was denied by the court of appeals.<sup>139</sup> Subsequently, the Georgia Supreme Court granted certiorari, and the case is now slated for the March 1995 session.<sup>140</sup>

### B. *The Holding*

The analysis of the court of appeals in *In re A.R.B.* began with the Georgia Constitution, which expressly promotes the interest of families, and concluded that the joint custody statute was passed on July 1, 1990 to implement this constitutional goal: "The legislative intent is to afford greater equality between parents in fostering relationships with their children so that the best interests of each child can be served."<sup>141</sup> The court pointed out that when the joint custody statute is considered in tandem with Code section 19-7-2, which places shared financial

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(No. A93A0698), *cert. granted sub nom.* B. v. B., No. S94C1253 (Ga. Sept. 20, 1994).

134. *Id.*

135. *In re A.R.B.*, 433 S.E.2d 411, 414 (Ga. Ct. App. 1993).

136. *Id.* at 413.

137. *Id.* at 413-14.

138. *In re A.R.B.*, No. 011-91J-1923-01 & 02, at 10-11 (Juv. Ct. Bibb County, Ga. Feb. 10, 1994) ("Based upon said direction by the Court of Appeals, this court concludes that it is obligated and required to find that joint legal and physical custody should be awarded to the mother and father of the child.").

139. *In re A.R.B.*, No. A94D0104 (Ga. Ct. App. Apr. 5, 1994) (denying Motion for Discretionary Appeal).

140. B. v. B., No. S94C1253 (Ga. Sept. 20, 1994) (granting Petition for Certiorari to review judgment of the Court of Appeals).

141. *In re A.R.B.*, 433 S.E.2d at 413.

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responsibility on each parent, the resulting policy favors shared parenting obligations.<sup>142</sup>

The court reasoned further that the 1990 and 1991 amendments to Code section 19-9-3(a) reinforce the shared parenting concept.<sup>143</sup> The court directed the trial judge to consider the extent to which divorced parents have demonstrated equal ability to take care of their children, in accordance with the express policy of the state.<sup>144</sup> By holding that it is in the best interests of the child to award joint custody when both parents have shown equal ability, the court has attempted to give more definite form to the best interests standard. It has strengthened the idea of the child's rights, in this case, to a continuing relationship with both parents. Although the right is qualified by requirements of equal parenting abilities, consideration of practicalities, and cooperation between the parties, it obligates the courts to look for occasions to award joint custody.<sup>145</sup>

However, there are several ambiguities in the language of the case that must be resolved. The opinion offers no practical suggestions as to how joint custody should be implemented and provides little in the way of concrete factors to be considered.

### 1. *Equal Parenting Abilities*

The Georgia Court of Appeals determined that "[w]here both parents have demonstrated equal ability to effectively care for and nurture the child, as here, it is in the child's best interest that a custody award be fashioned which will best encourage continuing and roughly equal contact with both parents . . . ."<sup>146</sup> What are equal abilities? If equal ability simply means parental fitness, the court's fact-finding task becomes narrower, and joint custody awards will become the norm. To rebut the presumption in favor of joint custody, the opposing parent would be required to prove the other parent unfit.<sup>147</sup> If, however, the relevant criteria is demonstrated parental aptitude, the court's task becomes factbound and unwieldy. On its face, *In re A.R.B.* makes no determination of the criteria to be considered. However, in the

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142. *Id.*; see O.C.G.A. § 19-7-2 (Supp. 1994).

143. *In re A.R.B.*, 433 S.E.2d at 413; see *supra* Part II.B.

144. *In re A.R.B.*, 433 S.E.2d at 414.

145. See *id.*

146. *Id.*

147. See generally O.C.G.A. § 19-7-1(b) (1991); see *supra* note 12.

instant case, the father had assumed many of the caretaker duties ordinarily undertaken by the mother.<sup>148</sup> The roles of the parents were practically reversed; the mother was highly career-oriented and spent a great deal of time away from home.<sup>149</sup> Are only "Mr. Moms" entitled to joint custody consideration? Does participation in caretaking duties determine equal abilities?

## 2. *Consideration of Practicalities*

The court of appeals stated that a court should fashion a joint custody award "given the practicalities involved."<sup>150</sup> This language is ambiguous. What practicalities are to be considered, and what weight is to be accorded each factor? Presumably, distance would be a factor; *In re A.R.B.* involved a father who had moved to Macon, Georgia while the mother remained in Atlanta.<sup>151</sup> However, the court does not discount the possibility of joint physical custody even when the parties live in places distant from one another.<sup>152</sup> Job schedules might be another factor; if one parent is heavily career-oriented with little time or desire to devote to parenting, that could be a practicality that would negate the possibility of shared parenting. Location of the child's school, proximity of extended family, and issues of continuity and stability are also factors meriting consideration.

## 3. *Cooperation Between the Parties*

The court emphasizes cooperation as a key ingredient.<sup>153</sup> Can a court realistically expect parental cooperation when the parties must resort to judicial intervention to resolve the issue of their own child's well-being? Does their presence as adversaries belie the existence of a cooperative atmosphere? And how much cooperation is required? Other jurisdictions have ordered joint custody when minimum levels of cooperation are met.<sup>154</sup> One

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148. See *In re A.R.B.*, 433 S.E.2d at 414.

149. See Brief of Appellant at 4-5, *In re A.R.B.*, 433 S.E.2d 411 (Ga. Ct. App. 1993) (No. A93A0698).

150. *In re A.R.B.*, 433 S.E.2d at 414.

151. Brief of Appellant at 3, *In re A.R.B.*, 433 S.E.2d 411 (Ga. Ct. App. 1993) (No. A93A0968).

152. *In re A.R.B.*, 433 S.E.2d at 414.

153. *Id.*

154. See, e.g., *In re Marriage of Behn*, 385 N.W.2d 540, 542 (Iowa 1986) (reasoning that "[f]lawed communication between the parents . . . does not in and of itself prevent a joint custody award"); *In re Marriage of Stafford*, 386 N.W.2d 118, 121-22

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author has theorized that animosities will decrease as time passes, particularly if the court orders parents to find some middle ground, and has argued that children should not be deprived of a parent simply to avoid conflict.<sup>155</sup>

#### 4. *Rights of the Child*

The Georgia Court of Appeals has recognized the child's rights to "equal access and opportunity with both parents, the right to be guided and nurtured by both parents, the right to have major decisions made by the application of both parents' wisdom, judgment and experience."<sup>156</sup> The court further reasons that the child does not forfeit these rights, but the parents may. "Whether a parent forfeits his or her portion of the relationship or any part of it, . . . must be determined by the factfinder."<sup>157</sup> Again, what criteria is applied? What constitutes forfeiture? Must a parent be proven unfit to be a legal or physical custodian, or is the burden only to show that one parent is not acting in the child's best interests? If the latter criterion applies, how would it be shown that the child's well-being is not being considered?

With the many combinations available for use in fashioning an award,<sup>158</sup> the notion of "part" of the relationship opens the door for parties to assert more fact-intensive claims. Given the strong emotions that run in custody disputes, this may prove to be a fertile source of dispute.

### IV. ISSUES CURRENTLY UNDER APPEAL

On appeal to the Georgia Supreme Court, the mother alleges that the trial court erred by awarding joint custody in light of the factual circumstances and applied the wrong legal standard for

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(Iowa Ct. App. 1986) (awarding joint custody even though the trial court record contained evidence of "tension, selfishness, and anger on the part of all the adults"); *Brown v. Eastburn*, 506 A.2d 449, 450 (Pa. Super. Ct. 1986) (holding that minimal cooperation was sufficient for a joint custody award when the parents were able to isolate personal conflicts from their parental duties); *Murphey v. Hatala*, 504 A.2d 917, 923 (Pa. Super. Ct. 1986) (awarding parties joint custody even though amicable relationship did not exist between them because a minimal degree of cooperation between the parties was found).

155. *Jennison*, *supra* note 3, at 1180, 1182.

156. *In re A.R.B.*, 433 S.E.2d 411, 414 (Ga. Ct. App. 1993).

157. *Id.*

158. See O.C.G.A. § 19-9-6(1) (1991). Joint physical and joint legal, joint legal with sole physical, sole legal and joint physical custody arrangements are available. *Id.*

making custody determinations.<sup>159</sup> The mother also alleges that the court of appeals erred by finding that the Georgia Code creates a joint custody presumption.<sup>160</sup>

### A. *The Legal Standard Applied in the Joint Custody Award*

The juvenile court in its February 10, 1994 order declined to hear new evidence and specifically adopted its prior Findings of Fact from March 17, 1992 as correct and appropriate.<sup>161</sup> A review of these findings reveals that the court found the parents equally fit as custodians for their son; the only difference was the presence of an older brother in the home of the mother.<sup>162</sup>

159. Brief of Appellant at 2, B. v. B., No. S95A0437 (Ga. filed Dec. 28, 1994).

160. *Id.*

161. *In re A.R.B.*, No. 011-91J-1923-01 & 02 at 1-3 (Juv. Ct. Bibb County, Ga. Feb. 10, 1994).

1. The court finds the child . . . is the child of the parties and he resided in the home of the parties . . . until . . . the parties separated. The father of the child at the time of the separation moved from the residence in Clayton County, Georgia while the mother was on a business trip out of the country taking the child with him and moving to Macon, Georgia where the father has resided since that time. The mother subsequently filed an action for divorce against the father in Bibb County, Georgia and temporary custody of the child was placed with the mother . . . .

2. The Court finds . . . that the mother . . . is capable of adequately providing for herself and her children.

3. The Court finds the father . . . is capable of financially providing for himself and his family.

4. The Court finds . . . that both of the parties have shared in caring for the child, who was the result of this marriage . . . .

5. The Court finds . . . that both the mother and the father are competent people to care for a child and they are both suitable for the care of the child of this marriage. In fact this Court has been greatly impressed by the ability, the intelligence, the demeanor, and the concern of both the husband and the wife, and concludes that either of said parties are perfectly capable of providing and caring for the child from this time forward . . . .

7. The Court finds the child involved has bonded with both the mother and the father . . . .

9. The Court having found both parties capable and able to care for the child compared the two homes and found that the older brother is in the mother's home and there having been a bonding of the child with this brother that it would be in the child's interest to spend the major portion of his time in the mother's home where he would have the association of his older brother on a regular basis.

10. The Court finds and concludes at this time that it would be in the best interest of the child that custody be placed with the mother.

*Id.*

162. *See id.* at 3. The juvenile court went on to state that although both parties are

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Appellant argues that the juvenile court's award of joint custody was made in violation of the best interests of the child standard.<sup>163</sup> She claims the court of appeals "unilaterally usurped [the] authority of the trial judge to sit as fact finder."<sup>164</sup> Appellee concedes that the duty of determining the best interests of the child has historically been left to the trial court; however, he contends that the trial court's duty has been refined by legislative directive that " 'abandons traditional biases and favors shared parenting rights and responsibilities.' "<sup>165</sup>

Appellee argues that by sending a message to judges at the trial level that gender bias is to be avoided and will be considered an abuse of discretion, *In re A.R.B.* does not abandon the best interests standard; rather it clarifies the application of the standard when the evidence shows and the trial court finds that both parents are equal in their ability and desire to nurture and care for their minor children.<sup>166</sup> Appellee argues that an award of joint custody based on the stated facts in the instant case provides full compliance with the stated legislative policy of the state.<sup>167</sup>

*B. Does In re A.R.B. Create a Presumption in Favor of Joint Custody?*

Appellant's second enumeration of error contends that the court of appeals created a presumption in favor of joint custody that supersedes the best interests of the child standard.<sup>168</sup> Appellant characterizes the policy set forth as "that of a property right of a parent who should be entitled to their one-half of the child."<sup>169</sup> In response, the father-appellee asserts that:

*A.R.B.* stands for the proposition that the law favors shared parenting when parents are capable of acting in the best

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well educated and competent, they are "unable to communicate with each other in a reasonable manner for the benefit" of their child. *Id.* at 10.

163. Brief of Appellant at 6-7, *B. v. B.*, No. S95A0437 (Ga. filed Dec. 28, 1994).

164. *Id.* at 7.

165. Brief of Appellee at 9, *B. v. B.*, No. S95A0437 (Ga. filed Jan. 16, 1995) (quoting *In re A.R.B.*, 433 S.E.2d 411, 413 (Ga. Ct. App. 1993); *Phillips v. Drake*, 449 S.E.2d 879, 881 (Ga. Ct. App. 1994) ("This rule of law lays the Solomonic task squarely upon the shoulders of the judge who can see and hear the parties and their witnesses, observe their demeanor and attitudes, and assess their credibility."))

166. See Brief of Appellee at 14-15, *B. v. B.*, No. S95A0437 (Ga. filed Jan. 16, 1995).

167. O.C.G.A. § 19-9-3(d) (Supp. 1994).

168. Brief of Appellant at 2, *B. v. B.*, No. S95A0437 (Ga. filed Dec. 28, 1994).

169. *Id.* at 9.

interest of their children; the decision does not create a presumption for joint custody. It does not abandon the best interest of the child standard, but gives the trial court guidance for determining what is in the best interest of the child when presented with facts such as those found in this case.<sup>170</sup>

#### V. A PROPOSAL FOR A MORE MANAGEABLE STANDARD

To avoid endless debate over what is relevant to a custody decision, the Georgia Supreme Court should provide some much-needed guidance to the lower courts. Is joint custody a presumption, a preference, or merely an option? Are the requirements of Code section 19-9-3 and *In re A.R.B.* met by merely giving lip service to the concept? If not, what factors are to be considered? In Georgia, there are no specific criteria used by courts to determine if joint custody is in the child's best interests. However, a number of states have statutory or common-law enumerations of factors to consider.<sup>171</sup>

A Michigan statute provides typical guidelines for determining the best interests of the child:

"[B]est interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

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170. Brief for Appellee at 17-18, *B. v. B.* No. S94C1253 (Ga. filed Jan. 16, 1995).

171. See *infra* notes 172-75.

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- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
- (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute.<sup>172</sup>

The factors in the Michigan statute are facially gender-neutral. Although some factors obviously require subjective value judgments, they balance parental contributions in a way that encourages fathers to share in caretaking responsibilities. The factors consider love, affection, and emotional ties, but do not penalize either parent for being the breadwinner. Capacity and disposition to provide for the child's material needs are also factors. The Michigan statute addresses the frequent concern that one parent's plans may include uprooting the child. The emphasis is on continuity and stability. The guidelines encourage cooperation between parents by considering the willingness of each to foster a close relationship between the child and the other parent.

A Minnesota statute prescribes factors to be considered when joint custody is sought and creates a rebuttable presumption that joint legal custody, if requested, is in the child's best interests.<sup>173</sup> Colorado,<sup>174</sup> Kentucky,<sup>175</sup> Utah,<sup>176</sup> and New

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172. MICH. COMP. LAWS ANN. § 722.23 (West Supp. 1994) (editor's marks omitted).

173. MINN. STAT. ANN. § 518.17 Subd. 2 (West Supp. 1995). When joint custody is sought, the court considers the following:

- (a) The ability of parents to cooperate in the rearing of their children;
- (b) Methods for resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use those methods;
- (c) Whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing; and
- (d) Whether domestic abuse . . . has occurred between the parents.

*Id.* "The court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child." *Id.*

174. COLO. REV. STAT. ANN. § 14-10-124(1.5) (West. 1987) (setting forth certain factors that shall or shall not be considered). The standard is whether the custody award is "advantageous to the child and in his best interests." *Id.* This standard



York<sup>177</sup> also provide specific criteria to be considered in joint custody and best interests decisions.

When primary caretaker status is a factor, other jurisdictions have specific criteria to determine which parent is the caretaker.<sup>178</sup> The Supreme Court of West Virginia lists performance of the following duties as indicators for determining primary caretaker status: "(1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers . . .; (6) arranging alternative care . . .; (7) putting child to bed at night . . .; (8) disciplining . . .; (9) educating . . .; (10) teaching elementary skills . . . ."<sup>179</sup>

By having the relevant considerations clearly delineated in statute or case law, the parties can focus their efforts on the true issues. The nebulous language of *In re A.R.B.* provides no clear focus on what is to be litigated and may foster lengthy debates over collateral issues. Mudslinging may come into play when parties have no hard guidelines as to what is relevant. Unless and until the courts understand what weight is to be afforded each factor in joint custody considerations, confusion and uncertainty will reign.

### CONCLUSION

Recommendations of the Georgia Commission on Gender Bias include educating judges to avoid gender-based beliefs in child custody decisions and recommending that judges set forth specific criteria to determine what is in the child's best interests.<sup>180</sup> The holding of *In re A.R.B.* accomplishes the first goal by sending a message to judges at the trial level that gender bias is to be

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applies to an initial determination of either sole or joint custody. *Id.*

175. KY. REV. STAT. ANN. § 403.270 (Michie/Bobbs-Merrill Supp. 1994) (providing the numerous factors that courts must consider).

176. *Pusey v. Pusey*, 728 P.2d 117, 119-20 (Utah 1986). There is no preference for an award based on the sex of the parent. Gender may not be relied upon as a determining factor in awarding child custody. The test is best interests of the child with an examination of "function-related factors." *Id.*

177. *Crum v. Crum*, 505 N.Y.S.2d 656, 657 (App. Div. 1986). Primary caretaker status "is a factor to be considered, but does not necessarily override other factors to be weighed in the balance." *Id.*

178. *Cochran*, *supra* note 42, at 223-24.

179. *Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981).

180. GENDER AND JUSTICE, *supra* note 11, at 671.

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avoided. The second goal must be to elucidate the message. In the absence of legislatively enumerated factors, this goal may be accomplished by specific language from the Georgia Supreme Court. Providing clear guidelines on how to implement the state's preference for joint custody will avoid needless litigation. Offering fact-based considerations will focus the issues the parties raise, and predictable outcomes based on delineated factors will encourage parties to reach agreement on the all-important issue of their child's future without resorting to judicial intervention.

*Josie Redwine*